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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~964~~ 108

INTERNATIONAL ASSOCIATION OF TOOL CRAFTSMEN,
INTERNATIONAL SOCIETY OF ELECTRICAL CRAFTSMEN,
MILLWRIGHTS INTERNATIONAL ASSOCIATION,
INTERNATIONAL MACHINE REPAIRMEN'S ASSOCIATION,
Petitioners,

v.

BOYD LEEDOM, PHILIP RAY ROGERS, STEPHEN S. BEAN, JOSEPH ALTON JENKINS, and JOHN H. FANNING, individually and as Chairman and Members of the NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your Petitioners, INTERNATIONAL ASSOCIATION OF TOOL CRAFTSMEN, INTERNATIONAL SOCIETY OF ELECTRICAL CRAFTSMEN, MILLWRIGHTS INTERNATIONAL ASSOCIATION, and INTERNATIONAL MACHINE REPAIRMEN'S ASSOCIATION, respect-

fully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on February 29, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals (infra, Appendix A), has not as yet been reported. In granting Respondents' Motion for Summary Judgment, the United States District Court for the District of Columbia did not write an opinion. The decision and order of the National Labor Relations Board involved herein (R. 6-20) is reported at 120 N.L.R.B. 162.

JURISDICTION

The judgment of the Court of Appeals affirming the order of the United States District Court granting Respondents' motion for summary judgment was entered on February 29, 1960 (R. 151). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the United States District Court for the District of Columbia had jurisdiction of an original action to vacate and set aside a decision of the National Labor Relations Board, dismissing petitions filed under § 9 of the National Labor Relations Act, 49 Stat. 453, 61 Stat. 143, 29 U.S.C. § 159, requesting separate representation rights for craft employees at various plants of the employers involved, on the ground that:

1. Although original certifications of the existing bargaining representatives had been made on an individual plant basis, in consequence of a long history of collective bargaining and the exclusive recognition accorded to the certificated union by the employer on a multi-plant unit basis, including 120 plants of the employer, there had come

into existence and then existed a single company-wide bargaining unit; and,

2. It had been the long-held policy of the Board that requests for severance elections must be co-extensive with the existing bargaining units from which a union seeks to detach specified categories of workmen; and that therefore, the single plant units sought were to narrow in scope and therefore inappropriate for purposes of collective bargaining.

STATUTES INVOLVED

The principal statute involved is the National Labor Relations Act, 49 Stat. 453, 61 Stat. 143, 29 U.S.C. §§ 141-168, hereinafter referred to as the Act. The pertinent parts of the statute are:

§ 1. • • •

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (29 U.S.C. § 151.)

§ 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. (29 U.S.C. § 157.)

§ 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority

of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; • • •

(b) The Board *shall decide in each case* whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or • • •

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) • • •

(B) • • •

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an *appropriate* hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. (Italics supplied) (29 U.S.C. § 159.)

STATEMENT OF THE CASE

Petitioners filed a number of representation petitions with the National Labor Relations Board under the provisions of §§ 9(c)(1) of the National Labor Relations Act,

supra, each of which alleged that Petitioners represented a substantial number of employees at various local plants of General Motors Corporation, Ford Motor Company, and Chrysler Corporation, and requested certification at each of said plants as the collective bargaining representatives of their respective craft employee members at such individual plants. Some of these petitions are reproduced in the record. (R. 101-117).

A number of the petitions so filed were noticed for hearing by the Board (R. 8) and hearings were held.

The International Union, United Automobile, Aircraft and Agriculture Implement Workers of America (United Auto Workers), AFL-CIO, hereinafter referred to as the UAW, and its respective locals who were the certified unions at the plants involved, intervened in these proceedings (R. 16). At the request of the UAW, six of the petitions involved in three cases were consolidated and set down by the Board for oral argument on May 21, 1958, at Detroit, Michigan, for the purpose of considering the contention of the UAW and General Motors Corporation, hereinafter called General Motors, that the Board ought not to establish any craft or other smaller than plant wide bargaining unit in the automobile industry. (R. 9). At this hearing, General Motors moved to dismiss the petitions on the ground that the proposed craft bargaining units at the individual plants of General Motors were inappropriate because they were not co-extensive with the single multi-plant bargaining unit, including all of the approximately 120 General Motors' plant locations, covered by the national agreement in effect between General Motors and UAW. (R. 11).

On the basis of this motion the Board discontinued the hearing on the question of establishment of craft or smaller than plant wide bargaining units in the automobile industry, gave petitioners a limited opportunity to reply to the motion to dismiss, denied petitioners request for oral argu-

ment on the motion to dismiss and granted General Motors motion to dismiss by decision dated May 28, 1958, the day the National Agreement between General Motors and UAW terminated. Petitioners' motion for reconsideration filed June 20, 1958 was denied on July 12, 1958.

In granting the motion of General Motors to dismiss, the Board found (R. 16) that in consequence of a long history of collective bargaining and the exclusive recognition accorded the UAW by General Motors under the terms of the national agreement between them, there had come into existence and then existed a single company wide bargaining unit. It then pointed to its long held policy that requests for severance elections must be co-extensive with the existing bargaining unit from which a union seeks to detach specified categories of workmen and held that the single plant units sought by Petitioners were too narrow in scope and therefore inappropriate for purposes of collective bargaining. (R. 16)

Upon the basis of this decision, all of the other petitions filed by Petitioners for certification as the representatives of their respective craft employee members were dismissed by the Board.

Petitioners thereafter commenced an original action in the United States District Court for the District of Columbia, attempting to invoke that Court's equity jurisdiction, alleging (R. 4, 5) arbitrary and capricious action by the Board, departure from the statutory requirements of § 9(b)(2) of the Act, and irreparable injury. Respondents moved the Court to dismiss the complaint or in the alternative for summary judgment (R. 5-6). Petitioners filed a cross-motion for summary judgment (R. 117-118). The District Court granted the motion for summary judgment without opinion. (R. 129) The Court of Appeals affirmed, holding that the Board's decision, based upon its finding that a multi-plant unit, including all of the approximately 120 General Motors' plant locations, was in existence by

reason of the long history of collective bargaining and the existing national agreement between General Motors and the UAW, and its long standing policy requiring petitions for severance elections to be co-extensive with the existing bargaining unit, fell within the wide area of determinations which depend on the Board's expertise and discretion (Appendix A, p. 4). The Court, therefore, concluded that the only available judicial review was under the provisions of § 10 of the Act, although it had been conceded during oral argument by Counsel for Respondent that there was no way in which Petitioners could obtain judicial review under § 10 of the Act. It is to be noted that the Court of Appeals in its opinion (Appendix A, pp. 2-3) states that Appellant's principal contention was that, as § 9(c)(5) preclude the Board from basing its unit determination upon the history of bargaining, the Board had violated that statutory prohibition in this case. Petitioners had abandoned this point during oral argument before the Court of Appeals.

ARGUMENT

Certiorari should be granted in the instant case for the following reasons:

1. An important question concerning the power of the National Labor Relations Board, acting under the provisions of the National Labor Relations Act, to decide which is the appropriate bargaining unit, in a representation case, upon the basis of a previously established policy, is involved.

2. An important question concerning the power of the National Labor Relations Board, acting under the provisions of the National Labor Relations Act, to establish a collective bargaining unit consisting of all of the production and maintenance employees of an employer, as broad in scope as the length and breadth of the United States, is involved.

Petitioners argue that the action of the National Labor Relations Board in this case:

1. Constituted a denial of due process, in that Petitioners were not accorded the "appropriate" hearing provided for

by § 9(c)(1) of the Act by reason of the Board's refusal to permit oral argument on the motion to dismiss Petitioners' petitions for certification;

2. Was arbitrary and capricious in finding on the record before it that the recognition accorded the UAW by General Motors under the terms of the National Agreement, which terminated May 28, 1958, the day of the Board's decision on the motion to dismiss, had brought into existence a company-wide bargaining unit, when in fact the local plant certifications of the local unions of the UAW were still in effect in the Board's records and the National Agreement reserved autonomy in the locals as to such matters as the right to strike;

3. Constituted a violation of the provisions of § 9(b) of the Act which requires the Board to "decide in each case whether, in order to assure to employers the fullest freedom in exercising the rights guaranteed" by the Act, the unit appropriate for the purposes of collective bargaining shall be the "employer unit, craft unit, plant unit, or subdivision thereof", in that in deciding that as there was in existence an employer unit and that a severance petition had to be co-extensive with the existing unit as a matter of policy, the Board did not in fact decide which was the appropriate unit in this case, but based its decision on a preestablished policy or judgment; and

4. Violated the policy established by Congress as expressed in §§ 1 and 7 of the Act and the statutory requirements of § 9(b) of the Act, in that its decisions established an employer unit of such breadth and scope as to preclude the employers from ever exercising the rights guaranteed by the Act. For these reasons the decision of the Court of Appeals was erroneous.

This Court has held that the statutory pattern of the National Labor Relations Act, *supra*, precludes judicial review of representation decisions of the National Labor Relations Board, excepting indirectly in connection

with judicial review of unfair labor practice orders under § 10 of the Act, 29 U.S.C. 160, or in the case of a showing of unlawful action by the Board and resulting injury whether by way of departure from statutory requirements or from those of due process of law. *American Federation of Labor* v. *National Labor Relations Board*, 1940, 308 U.S. 40, 60 S. Ct. 300, 84 L. Ed. 347; *Inland Empire Dist. Council, etc.* v. *Millis*, 1945, 325 U.S. 697, 65 S. Ct. 1318, 89 L. Ed. 1877.

In *American Federation of Labor* v. *National Labor Relations Board*, *supra*, this Court said in answer to an argument of the Board that the provisions of § 10(f) of the Act foreclosed review of its challenged action (308 U.S. 412):

> "But that question is not presented for decision by the record before us. Its answer involves a determination of whether the Wagner Act, so far as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction conferred by § 24 of the Judicial Code. 28 U.S.C.A. § 41. It can be appropriately answered only on a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record."

In *Inland Empire Dist. Council, etc.* v. *Millis*, *supra*, this Court pointed to its suggestion of possible jurisdiction in the case of *American Federation of Labor* v. *National Labor Relations Board*, *supra*, in a case which petitioners contended presented the required showing of unlawful action and resulting injury because of a denial of due process of law. Petitioners' specific contention was that the "appropriate" hearing requirements of § 9 (c)(1) of the Act, 29 U.S.C. § 159 (c)(1), had not been met and that they had therefore been denied due process. This Court, again reserving the question of equity jurisdiction in an appro-

priate case, concluded that the hearings accorded were adequate, stating (325 U.S. 708):

> "We need not decide whether the hearings would have been adequate or 'appropriate' if the February 1944 hearings had not been granted and held. * * *"

Then in *Leedom v. Kyne*, 1958, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210, the Court had before it a question involving the power of the Board to order the establishment of a bargaining unit including professional employees with non-professional employees, without first granting the professional employees the right to vote in favor of such inclusion as required by § 9(b)(1) of the Act, 29 U.S.C. 159(b)(1). Finding that the record in that case squarely presented the situation not presented in the prior cases, and that the case in its posture before the Court involved unlawful action by the Board which had inflicted injury on the Respondent (Plaintiff below) this Court stated (358 U.S. 188):

> "* * * Does the law, 'apart from the review provisions of the * * * Act,' afford a remedy? We think the answer surely must be yes. This suit is not one to 'review', in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act."

In the instant case Petitioners filed petitions under § 9(c)(1), of the Act, 29 U.S.C. 159(c). It must be assumed that the Board investigated such petitions as required by § 9(c)(1) and found "reasonable cause to believe that a question of representation affecting commerce" existed, as it ordered hearings on such petitions. However, the conduct of the Board after hearings had been commenced would appear to constitute unlawful action with corresponding irreparable injury to the Petitioners in the respects herein after discussed.

Upon the filing of the General Motors motion to dismiss, while the Board accorded Petitioners an opportunity to

file a written reply, this opportunity to reply was given by telegraphic notice which went out on May 22, 1958, and gave Petitioners only to May 26, 1958 to reply (R. 20). Petitioners request for an opportunity to file briefs and for oral argument before the Board was summarily denied. It can only be concluded that the Board's hasty action was dictated by the fact that it intended to grant the motion to dismiss on the basis of the finding that was ultimately made, and that this finding depended upon the existence of the National Agreement between UAW and General Motors, which was to terminate May 28, 1958. The Boards decision was dated May 28, 1958. This hasty action and the denial of the right to file briefs and oral argument constituted a denial of due process.

In order for the Board to grant the Motion of General Motors to dismiss the representation petitions pending before it, it was also necessary for the Board to find that a Company-wide, multi-plant, or employer unit in fact existed. However, the local UAW Unions had, starting in 1938, won successive single plant elections in the approximately 120 plants of General Motors and had been certified as the exclusive representatives in *each* plant as a separate bargaining unit (R. 12). The Board, therefore, had to find, if it proposed to favor the continued control of the UAW, that the contract between UAW and General Motors established the employer unit. This it did despite the fact that both parties had given notice of termination thereof on May 28, 1958, and despite the fact that the record and the national agreement disclosed a relation between General Motors and UAW, as employer on the one side, and as agent for all of the certificated locals on the other. (R. 33-101). The contract itself preserved this agency relationship and the right to strike was specifically reserved to the local unions. A careful examination of the record and the contract, which is on file with the Board, suggests that the decision of the Board on this aspect of the case was arbitrary and capricious. It is one thing to say that decisions in representation cases are within the discretion of the

Board. It is another matter where there is a clear abuse of discretion and arbitrary and capricious action in connection therewith. Such action should be considered "unlawful" action for the purpose of the original jurisdiction of the district courts under 28 U.S.C. § 1337.

The provisions of § 9(b) of the Act require that the Board *shall decide in each case*, what, the appropriate bargaining unit shall be. This language is clear and mandatory; as clear mandatory, it is urged, as the language of § 9(b)(1) which was involved in *Leedom* v. *Kyne*, *supra*. Nevertheless the Board has, so it says, established a policy of long standing, that once a collective bargaining unit has been established, employees may not petition for the establishment of another appropriate bargaining unit and for representation in that bargaining unit, unless the petition is coextensive with the existing bargaining unit. Thus, in a case where the Board finds that a company-wide, multiplant, or to use the words of the statute, employer unit exists, or where the Board has previously decided that the employer unit is the appropriate unit under § 9(b) of the Act, it will not entertain a petition for the establishment of a craft unit, unless the proposed craft unit is also an employer unit covering all of the plants of the particular employer. Such a policy amounts to a decision in advance, of at least a part of the question which the Board is required to decide in each case. It precludes the Board from making an independent decision in each case, when the circumstances and conditions might well require, after a hearing, the disestablishment of a large bargaining unit and the establishment of smaller units. Such a policy can only be construed as a violation of the statutory mandate to decide in each case.

The effect of the Board's decision in this case is to deny to the employees represented by Petitioners the rights guaranteed to them by the Act. Here, the requirement that Petitioners petition for representation of all of the craft employees of General Motors in the 120 plants of that

Company, before the Board will hear the petitions and decide whether or not a craft unit is an appropriate unit and order elections, effectively denies to the employee members of Petitioners the right of self organization and to bargain collectively through representatives of their own choosing, as guaranteed to them by § 7 of the Act. Under Board regulations and the Act before such petitions could be filed, the Petitioners would have to represent at least 30% of the employees in the proposed employer craft unit. As a practical matter, employers seeking to organize for the first time, as is the case here, could never mount the necessary organizing campaign among all the 120 plants of General Motors Corporation in order to compete with the UAW on a multi-plant basis. The Board has in the past recognized this problem and has conceded that this is true, despite its present position as to the long-standing policy of requiring co-extensive petitions and units. In *Joseph E. Seagram and Sons, Inc.*, 1952, 101 N.L.R.B. 101, the Board said:

> "* * * For the Board to continue to insist that employees who seek to organize for the first time do so only in a unit comprising employees in 15 plants spread over hundreds of miles of territory would be, in practical effect, to deny them the right to collective bargaining and the 'fullest freedom in exercising the rights guaranteed by this Act.' Labor organization is often a process of growth which proceeds from small to large. Not many employee groups can simultaneously mount an organizing campaign among employees at 15 plants located in five different States. * * *"

Therefore, Petitioners respectfully request that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15078

INTERNATIONAL ASSOCIATION OF TOOL CRAFTSMEN, ET AT.,
APPELLANTS

v.

BOYD LEEDOM, ET AL., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD,
APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided February 29, 1960

Mr. Robert Sheriffs Moss for appellants.

Mr. James C. Paras, Attorney, National Labor Relations Board, with whom *Messrs. Thomas J. McDermott*, Associate General Counsel, National Labor Relations Board, *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, and *Frederick U. Reel*, Attorney, National Labor Relations Board, were on the brief, for appellees.

Before BAZELON, WASHINGTON and BASTIAN, Circuit Judges.

BAZELON, *Circuit Judge:* This is an appeal from an order of the District Court, entered on cross motions,

granting summary judgment for appellees, the chairman and members of the National Labor Relations Board, in appellants' suit for equitable relief. The complaint challenged the Board's action in dismissing eight of appellants' petitions, under § 9 of the Labor Management Relations Act, 61 STAT. 143 (1947), as amended, 29 U.S.C. § 159 (1958), requesting separate representation rights for certain craft employees at various plants of the General Motors Corporation and one plant of the Ford Motor Company. The United Automobile Workers (UAW) has long been the exclusive bargaining agent for a great majority of the employees at almost all General Motors and Ford plants, including those plants named in the petitions. Although the UAW has been certified by the Board on an individual plant basis, the Companies and the Union have always negotiated nation-wide and company-wide master contracts covering all the plants at which the Union is the collective bargaining agent.

The Board found "on the entire record, that in consequence of this long history of collective bargaining and the exclusive recognition accorded the United Automobile Workers by General Motors on a multi-plant unit basis, there has come into existence and there now exists a single company-wide bargaining unit. . . ." 120 N.L.R.B. 1215, 1221 (1958). It also found the same to be true at Ford. It then pointed out to its long-held policy "that requests for severance elections must be coextensive with the existing bargaining unit from which a union seeks to detach specified categories of workmen," citing *St. Regis Paper Co.*, 101 N.L.R.B. 655 (1952). Accordingly, the Board held that the single plant units sought here were "too narrow in scope and therefore inappropriate for purposes of collective bargaining." 120 N.L.R.B. at 1221.

Appellants' principal contention in this appeal is that the 1947 enactment of § 9(c)(5) "precludes the Board from basing its unit determination upon history of bar-

gaining."[1] That section provides that "In determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be *controlling*." (Emphasis supplied.)

The jurisdiction of the District Court to grant relief in this original equity suit depends upon a clear showing that the Board acted "in excess of its delegated powers and contrary to a specific prohibition in the Act," *Leedom v. Kyne*, 358 U.S. 184, 188 (1958). To read section 9(c)(5) as such a prohibition it must plainly appear that bargaining history (upon which the Board relied) and the "extent of organization" (which "shall not be controlling") are one and the same.

The Board urges that the legislative history of § 9(c)(5) establishes that the "bargaining history and extent of organization are not identical, but are totally dissimilar." It says that the meaning of "extent of organization" as used in § 9(c)(5) is apparent from the purpose of that section. That purpose, we are told, was to overrule some pre-1947 decisions of the Labor Board which certified smaller than normal bargaining units solely because the Union had organized less than a majority of the employees in what otherwise would be an appropriate unit. See, *e.g.*, 93 CONG. REC. 6444, 6860 (1947) (Statements of Senator Taft). In contrast, a successful "history of bargaining," says the Board, is merely some evidence of natural groupings of employees which it has consistently taken into consideration in determining what

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[1] Appellants sought review in the court below on the theory that the Board's action violated § 8(b)(2). That section provides that the Board shall not "decided that any craft unit is inappropriate . . . on the ground that a different unit has been established by a prior Board determination . . . ."

On appeal appellants have apparently abandoned any contention that the Board acted in contravention of § 9(b)(2), for their brief does not list it in the statement of points.

constitutes an appropriate unit. See Cox, Cases on Labor Law 364 (4th ed. 1958).

We need not decide whether we would sustain the Board's view if the question were presented to us in an appeal under the judicial review provisions of § 10 of the Act. 61 Stat. 146, as amended, 29 U.S.C. § 160 (1958). We need only decide, as we do, that the statutory language itself and the legislative history sufficiently support its position to eliminate the essential requirement for invoking the District Court's equity jurisdiction, namely, a showing that the Board violated a "clear and mandatory" statutory prohibition by according controlling consideration to bargaining history. *Leedom* v. *Kyne*, *supra* at 188.

Appellant also suggests that the Board has evaded its statutory duty to determine the "appropriate unit" by dismissing the craft severance petitions, without a hearing, on the ground that they were not coextensive with the existing bargaining unit. Section 9(b) requires the Board to determine "in each case" which unit will "assure to employees the fullest freedom in exercising the rights guaranteed by this Act . . . ."[2] The Board did not say why employees cannot exercise the fullest freedom in collective bargaining unless severance petitions are coextensive with the existing unit. But the question of an appropriate bargaining unit falls within "the wide area of determinations which depends on the Board's expertise and discretion," *Leedom* v. *Kyne*, 101 U.S. App. D.C. 398, 249 F. 2d 490 (1957), *affirmed*, 358 U.S. 184 (1958), and the statute does not specify any matters pertinent here

[2] Section 9(b) reads:

"The Board shall decide in each case whether in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ."

which the Board must consider to insure such freedom. Consequently, we cannot say that the Board's procedure has violated any "clear and mandatory" provision of the Act. *Leedom* v. *Kyne, supra* at 188. What factors the Board considered and what weight it accorded to them are questions which may only be raised in a judicial review proceeding under § 10.

We therefore conclude that the District Court's order dismissing this suit is correct.

Affirmed.

No. 961 108

FILED
JUN 24
JAMES R. BROWNING

In the Supreme Court of the United States

OCTOBER TERM, 1959

INTERNATIONAL ASSOCIATION OF TOOL CRAFTSMEN, ET AL., PETITIONERS

v.

PAUL M. HERZOG, ET AL., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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Section 9(c)(5)	7, 8

Miscellaneous:

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Sec. 102.67	3
Sec. 102.68	10

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 964

INTERNATIONAL ASSOCIATION OF TOOL CRAFTSMEN, ET AL., PETITIONERS

v.

BOYD LEEDOM, ET AL., INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the District Court granting respondents' motion for summary judgment is set forth at R. 128-129.[1] The opinion of the court below (Pet. 1a-5a), affirming the order of the District Court, is reported at 276 F. 2d 514. The Board decision in-

[1] References are to the portion of the record printed as a Joint Appendix to the briefs in the court below.

volved in this case (R. 6-19) is reported at 120 NLRB 1215.

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 1960 (Pet. 2). The petition for a writ of certiorari was filed on May 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District Court has jurisdiction to review a Board determination under Section 9 of the National Labor Relations Act that craft severance elections should be held in the existing multi-plant bargaining unit, rather than in single plant units, where it appears that such determination turns on considerations involving an exercise of the Board's judgment and discretion and does not encounter any statutory prohibition.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 3-4 of the petition.

STATEMENT

A. The Board representation proceedings

Since 1938, the United Automobile Workers Union has been the major bargaining representative of General Motors' employees. U.A.W. was originally certified, pursuant to Board-conducted elections, on a sep-

arate plant basis, for each of 120 G.M. plants. However, the parties have always negotiated a single, company-wide contract covering, in virtually identical terms, all the plants at which U.A.W. was the collective bargaining agent. This single, centralized bargaining procedure has resulted in the obliteration of the previously existing plant units and in the creation of a single, company-wide bargaining unit encompassing the 120 U.A.W.-represented plants (R. 12).

On April 4, 1958, petitioners, International Association of Tool Craftsmen and International Society of Electrical Craftsmen, filed separate petitions with the Seventh Regional Director of the National Labor Relations Board requesting representation rights at the Pontiac Motors Division of the General Motors Corporation. Separate petitions were filed for the tool room employees in Dept. 345, for the tool inspectors in Dept. 347, for the tool and die employees in Dept. DA45, etc. (R. 101-117). A consolidated hearing was held on these petitions in Detroit, from May 6 to May 16, 1958.[2] At the close of the hearing, pursuant to established Board procedure,[3] the Regional Director forwarded the entire record in these cases, including a stenographic transcript of the hear-

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[2] The records of the representation cases were annexed as exhibits to the Board's motion for summary judgment in the District Court and were part of the record before the court below. The U.A.W. was permitted to intervene in all the proceedings, on the basis of its standing as the collective bargaining representative of the employees involved (R. 10).

[3] NLRB Rules and Regulations and Statements of Procedure, Series 8, Sec. 102.67.

ing, to the Board in Washington for final disposition of the matters raised by the petitions.

In view of the importance of the issues raised by the petitions and the fact that a large number of similar petitions had been filed in Regional Offices throughout the country, the Board directed that oral argument be presented in Detroit on May 21, 1958, on the question whether collective bargaining in the automobile industry should continue on an industrial unit basis or whether separate crafts should be permitted to bargain for their particular members. The Board, in other words, invited argument on whether the so-called *National Tube* doctrine,[4] applicable to the steel and certain other basic industries, should be applied to the automobile industry (R. 9-10).

At this hearing, GM prefaced its submission of views on the *National Tube* issue by moving to dismiss the petitions involved on the ground that the units sought were in any event inappropriate. GM contended that craft elections, if directed, could properly be held only in the multiplant unit as a whole, whereas the petitions sought such elections on a single plant basis (R. 10-11, 38).

On May 22, the Board sent telegrams to the other parties to the proceeding, notifying them that, should they desire to respond to GM's motion, they should do so on or before 5 p.m., May 26. Petitioners filed

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[4] In *National Tube*, 76 NLRB 1199, the Board dismissed a petition to sever a unit of bricklayers from an existing industrial unit on the ground that the integrated nature of the operations in the steel industry necessitated the maintenance of the plant-wide industrial unit.

an opposition to the motion, setting forth reasons why the Board should not dismiss their petitions (R. 11-12, 20-24). In conjunction with the opposition, petitioners submitted a request for oral argument on the motion (R. 21-26).

On May 28, the Board issued its decision and order dismissing the representation petitions. The Board found "on the entire record, that in consequence of [the] long history of collective bargaining and the exclusive recognition accorded the UAW by GM on a multiplant basis, there has come into existence and there now exists a single company-wide bargaining unit embracing all those plants of the company in which the UAW has in the past been recognized as the exclusive representative, and which are covered by the existing national agreement." Applying its established principle that "requests for severance elections must be co-extensive with the existing bargaining unit from which a union seeks to detach specified categories of workmen," the Board concluded, in agreement with GM's contention, that the single-plant units sought by petitioners were "too narrow in scope and therefore inappropriate for purposes of collective bargaining" (R. 16).[5]

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[5] In this decision, the Board denied petitioners' request for oral argument, stating that because "the lengthy and very comprehensive records in the 3 General Motors cases reveal a full and detailed picture of the history and methods with respect to the collective bargaining between that Company and U.A.W., no useful purpose would be served by further oral argument on the Company's motion" (R. 16, n. 13).

On June 23, petitioners filed with the Board a motion for reconsideration of this decision, requesting additionally that elections be held pursuant to their original petitions (R. 26-30). On July 7, the Board denied the motion "on the ground that nothing [was] presented that [had] not been previously considered by the Board" (R. 31-33).

B. The judicial proceedings

On August 30, 1958, petitioners brought suit in the District Court, seeking a mandatory injunction which would set aside the Board's decision and order the Board to reinstate the representation petitions and to proceed to elections thereon. The gravamen of the complaint was that the Board, in dismissing petitioners' representation petitions, violated Section 9 (b) (2) of the Act (R. 2-5).[6] No allegation was made that the Board violated any other statutory provision (*ibid.*). In response, the Board moved to dismiss the complaint and, in the alternative, for summary judgment, on the grounds that the court lacked jurisdiction of the subject matter of the action and that the complaint failed to state a claim warranting relief. On November 17, petitioners filed a cross-motion for summary judgment based on the same ground set forth in their original complaint (R. 117-118). On December 17, the District Court granted the Board's motion for summary judgment and denied petitioners' cross-motion (R. 129).

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[6] Section 9(b) (2) provides that the Board shall not "decide that any craft unit is inappropriate for [bargaining] purposes on the ground that a different unit has been established by a prior Board determination * * *."

On appeal, petitioners abandoned their contention that the Board had acted contrary to Section 9(b)(2) and urged, for the first time, that the Board's decision contravened Section 9(c)(5) of the Act.[7] The Court of Appeals held that the Board, in dismissing the representation petitions in question, had not acted "in excess of its delegated powers and contrary to a specific prohibition in the Act." Accordingly, it concluded, the District Court lacked jurisdiction to review the Board's denial of single plant, craft units in this case and had properly dismissed petitioners' suit. (Pet. 3a-5a).

ARGUMENT

1. *Leedom* v. *Kyne*, 358 U.S. 184, permits an exception to the general rule that Board representation determinations are not reviewable in the district courts. The exception, however, is confined to the case where it is plain that the Board has exceeded statutory or constitutional requirements and no other adequate remedy exists for redress of the wrong. In the absence of such a showing, district court review is barred. See *National Biscuit Division* v. *Leedom*, 265 F. 2d 101 (C.A. D.C.), certiorari denied, 359 U.S. 1011; *Norwich Conn. Printing Specialties, Local Union No. 494* v. *Leedom*, 275 F. 2d 628 (C.A. D.C.), certiorari denied, 362 U.S. 969; *Leedom* v. *I.B.E.W.*, 45 LRRM 3005, decided March 24, 1960 (C.A. D.C.). It is clear, as the court below found, that the required showing cannot be made here.

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[7] Section 9(c)(5) provides that in determining whether a unit is appropriate for bargaining purposes "the extent to which the employees have organized shall not be controlling."

Section 9(b) of the Act vests the Board with power to "decide in each case whether * * * the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Subparagraph (2) of the section provides, further, that the Board shall not decide that any craft unit is inappropriate "on the ground that a different unit has been established by a prior Board determination * * *." The Board thus has broad discretion to establish or not to establish a craft unit, with the proviso that it may not decline to do so simply because a large unit had previously been found to be appropriate. The Board declined to find the craft units sought by petitioners appropriate; not on the ground that craft units *per se* were barred in the automobile industry, but merely because it would be better to have them established on a company-wide rather than a plant-wide basis. This is not the kind of determination barred by Section 9(c)(5), as petitioners implicitly recognize in failing to argue the point in the petition. The Board decision rests simply upon a judgment that the same factors of central control and integration of operations which make it appropriate to establish an industrial unit on a multiplant rather than a plant basis also require that, when a craft is sought to be severed from such a bargaining unit, the severance include all the employees in that craft throughout the entire unit.[8] This

[8] See *American Steel Foundries*, 101 NLRB 655; *T. C. King Pipe Co.*, 74 NLRB 468; *Western Electric Co.*, 71 NLRB 1029.

conclusion represents a reasonable accommodation of the Act's competing policies of insuring stability and at the same time affording employees freedom in their choice of a representative. The effectuation of these policies falls within "the wide area of determinations which depends on the Board's expertise and discretion" (Pet. 4a) and is beyond the reviewing jurisdiction of a district court.

2. There is no substance to petitioners' contention (Pet. 11-12) that the Board violated the requirement of Section 9(b) of the Act that it "decide in each case" what the appropriate unit shall be. The Board decision (R. 8-19) shows that it arrived at the conclusion that a single company-wide bargaining unit had been created after a careful review of the past bargaining history and the integrated nature of GM's operations. By applying the principle that any craft severance would have to be coextensive with this unit, the Board necessarily decided that, on the facts of this case, a company-wide unit was an appropriate one. Nor was the decisional process incomplete merely because the craft severance principle applied had been formulated in earlier cases; the application of that principle here reflects a judgment that the considerations which led to its original formulation likewise pertained to this case. Compare *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 348-349; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 202; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192.

3. Similarly without substance is petitioners' contention (Pet. 11) that the Board's denial of oral argument on their opposition to GM's motion to dismiss their petitions violated due process. Neither the Constitution nor the Act guarantees oral argument in all situations. See *FCC* v. *WJR*, 337 U.S. 265, 281-282; *Morgan* v. *United States*, 298 U.S. 468, 481; *National Labor Relations Board* v. *Clausen*, 188 F. 2d 439, 444 (C.A. 3), certiorari denied, 342 U.S. 868; *Fay* v. *Douds*, 172 F. 2d 720, 725 (C.A. 2); NLRB Rules and Regulations and Statements of Procedure, Series 8, Sec. 102.68. Since the issues sought to be raised involved questions of law and policy on which briefs had been submitted and since the comprehensive record gave a full picture of the bargaining situation, the Board was amply warranted in concluding that "no useful purpose would be served by further oral argument on the Company's motion" (R. 16, n. 13). Moreover, it should be noted that petitioners also had an opportunity to present their views to the Board in a motion for reconsideration (R. 28-30), which the Board denied after due consideration (R. 32-33).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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